

INFORMAL ADVISORY OPINION NO. 2003-2

The Hawaii State Ethics Commission ("Commission") filed a formal Charge against a legislator alleging that the legislator had misused his position as a legislator for campaign purposes and had misused state resources for campaign purposes, both in violation of the State Ethics Code, set forth in chapter 84 of the Hawaii Revised Statutes ("HRS").

The Charge arose from two news releases issued by the legislator. The first news release was prepared on official legislative stationery, and listed the legislator's official position as the senator for his district, his official position as the chair of a senate committee, and his membership on several senate committees. The news release stated that the news release was issued by the legislator and also by the director of a state agency. The news release gave the appearance that it was issued in the legislator's official capacity, as well as in the state agency director's official capacity. The body of the news release consisted of five pages, and stated that the legislator and the director of the state agency had mapped out an overall direction for the State's economy. The body of the news release also discussed an economic development plan for the State. The news release ended with a statement by the legislator indicating that he would be running for a council seat of a particular county and that, when elected, the legislator intended to use the economic plan discussed in his news release to resolve the serious financial problems caused by the mayor of the county whose council the legislator wished to be elected to. The news release stated that further information could be obtained by contacting the legislator at his state telephone number or pager, or by contacting the director of the state agency at his state telephone number.

The Commission received information that within nine days of the date of the legislator's news release, the legislator formally filed his candidacy for a seat on the particular county council referenced in his news release.

Approximately three weeks after formally filing as a candidate for the council position, the legislator prepared a second news release on official legislative stationery. The legislative stationery bore the State Seal, and had attached to it the previous news release. As with the legislator's first news release, the second news release stated that it was issued by the legislator and the director of the state agency, and gave the appearance that it was being issued in their official state capacities. The body of the legislator's second news release consisted of two pages. The news release stated that the legislator and the director of the state agency would: (1) be holding a press conference the following day to announce an overall economic plan to stimulate and stabilize the economy of the State; (2) discuss highlights of recent trips taken by the legislator and the state agency director; and (3) promote an upcoming convention in Hawaii.

Within two days of the date of the legislator's second news release, the governor issued a news release that criticized the legislator for issuing a joint news release that used the name of the state agency director without the state agency director's approval. The governor's news release stated that the state agency director was never consulted about the legislator's news release, and that the director did not give his approval that

the news release be issued jointly with the use of the director's name. The governor also criticized the legislator's first five-page news release as being poorly thought out.

The State Ethics Commission issued a Charge against the legislator, alleging that the legislator misused his legislative position for campaign purposes in violation of HRS section 84-13. The Charge further alleged that the legislator misused state resources, in particular legislative stationery and the State Seal, for campaign purposes, in violation of HRS section 84-13(3). The Charge alleged that the legislator's two news releases were issued solely for the purpose of promoting the legislator's campaign for a new elective office.

The State Ethics Commission based its Charge on the fact that the legislator's initial five-page news release, which was prepared on official legislative stationery and issued in the legislator's official capacity as the chair of a legislative committee, contained what the Commission considered to be a campaign statement. Further, based on the governor's news release, it was apparent to the Commission that the legislator had not received approval from the state agency director to issue a joint news release under the director's name. Also, the governor's news release, by making reference to the legislator's five-page news release, made it clear to the Commission that the legislator had attached his first news release, which contained the campaign statement, to his second news release. This resulted in the legislator's campaign statement being issued on two separate occasions on official legislative stationery, one of which carried the State Seal.

A copy of the Commission's Charge was sent to the legislator. The legislator was informed by the Commission of his right to respond to the Charge in writing, and his right to appear before the Commission to address the Charge.

The legislator filed a written response to the Charge. In his written response, the legislator asserted that he prepared only one news release, and that the news release was not prepared or distributed to gain an unfair advantage in his bid for a new elective office. The legislator also asserted that he had not formally filed or announced his candidacy for elective office when he prepared his news release. The legislator also asserted that the plans contained in his news releases were plans he had worked on and advocated for in his capacity as a legislator. The legislator stated that his news release was not intended to further his candidacy for elective office. The legislator stated his belief that it was unfair for the Commission to assume he would be filing as a candidate for elective office and basing a Charge upon this assumption. The legislator stated that he was troubled that the Commission decided to pursue this matter, and that he believed the Charge was generated for purely political reasons. The legislator maintained that the Charge's "constant" references to the governor indicated that the Charge was issued at the governor's urging. The legislator stated that the public demanded that the Commission be unbiased in its actions, and that any appearance of political favoritism should be avoided by the Commission. However, the legislator stated that in reading the Charge, he understood the Commission's concern regarding the "appearance" of an impropriety, and the legislator assured the Commission that he would make every effort to avoid appearances of impropriety in the future.

After receiving the legislator's written response, the Commission reviewed and considered the matter. The Commission had charged the legislator with misusing his legislative position and misusing state resources for campaign purposes. These

alleged violations fell under HRS section 84-13, which provides, in its entirety, as follows:

§ 84-13 Fair treatment. No legislator or employee shall use or attempt to use the legislator's or employee's official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for oneself or others; including but not limited to the following:

- (1) Seeking other employment or contract for services for oneself by the use or attempted use of the legislator's or employee's office or position.
- (2) Accepting, receiving, or soliciting compensation or other consideration for the performance of the legislator's or employee's official duties or responsibilities except as provided by law.
- (3) Using state time, equipment or other facilities for private business purposes.
- (4) Soliciting, selling, or otherwise engaging in a substantial financial transaction with a subordinate or a person or business whom the legislator or employee inspects or supervises in the legislator's or employee's official capacity.

Nothing herein shall be construed to prohibit a legislator from introducing bills and resolutions, serving on committees or from making statements or taking action in the exercise of the legislator's legislative functions. Every legislator shall file a full and complete public disclosure of the nature and extent of the interest or transaction which the legislator believes may be affected by legislative action.

In general, HRS section 84-13 prohibits state legislators and state employees from using or attempting to use their official positions to give themselves or others any unwarranted advantages or privileges. Further, HRS section 84-13(3) specifically prohibits the use of state time, equipment, or facilities for a private business purpose.

The State Ethics Commission has long interpreted HRS section 84-13 to prohibit the use of a legislator's official position, the State Seal, and state stationery for campaign purposes. Similarly, the State Ethics Commission has interpreted HRS section 84-13(3) to bar the use of state time, equipment, or facilities for campaign purposes. The State Ethics Commission has also determined that HRS section 84-13 in general bars the unwarranted use of any state resources for campaign purposes.

For purposes of HRS section 84-13, the State Ethics Commission has long maintained that campaigning for elective office is a private business activity, since candidates who are elected to office are generally compensated. Further, the State Ethics Commission has long held that a candidate's campaign organization would generally be considered a private business, in line with the definition of the term "business" set forth in the State Ethics Code. In any event, the use of one's state

position, and the use of state resources by state officials or employees for political campaign purposes, are prohibited by HRS sections 84-13 and 84-13(3).

The final paragraph of HRS section 84-13 provides that HRS section 84-13 is not applicable to a legislator who is acting within the scope of the legislator's legitimate legislative functions.

The Commission believed that the news release that the legislator in fact acknowledged preparing and distributing did contain information about matters that fell within the purview of the legislator's legitimate legislative functions. These matters included matters affecting the senatorial district that the legislator represented, as well as matters of statewide concern. The Commission believed that the use of the legislator's legislative position, legislative stationery, and the State Seal for such matters would not raise ethics concerns.

However, the State Ethics Commission believed that the news release that the legislator acknowledged preparing and distributing also contained a statement that was indisputably a campaign statement. The inclusion of this campaign statement in the news release converted what would otherwise have been a proper use of the legislator's legislative position and a proper use of state resources into a misuse of the legislator's legislative position and a misuse of state resources for a campaign purpose. Further, it appeared to the State Ethics Commission that the news release containing the campaign statement was distributed on two separate occasions--by itself, and together with the second news release.

Despite the legislator's contention that his news releases were not prepared or distributed to gain an unfair advantage in his effort to seek elective office, the State Ethics Commission remained unconvinced. To the contrary, it was apparent to the Commission that the contents and timing of the legislator's two news releases were calculated to promote his candidacy for an elective position. The legislator's first news release, which contained the campaign statement, was dated a mere nine days before the legislator formally filed as a candidate for elective office. This news release was attached to the legislator's second news release, and this resulted in the campaign statement being re-circulated and re-distributed three weeks after the legislator formally filed to be a candidate for elective office.

The State Ethics Commission has long maintained that the State Seal, state stationery, and one's official position may not be used for campaign purposes. The Commission has maintained that if state stationery is used, it must be used for official purposes only. The Commission has long advised that campaign statements must be removed from official correspondence. Over the years, the Commission has gone to great lengths to educate state legislators and state employees that one's official state position and state resources may not be used for campaign purposes. In light of the Commission's longstanding and much publicized position on this point, the Commission believed that someone with the legislator's experience and years as a legislator should have exercised better judgment.

The legislator's written response to the Charge stated that he understood the Commission's concern regarding the "appearance" of an impropriety. However, the Commission believed that this case was not a case involving a mere appearance of impropriety, but a case involving an actual impropriety.

After reviewing this case and the legislator's written response to the Charge, the State Ethics Commission voted to resolve this case by issuing an informal advisory opinion to the legislator. The State Ethics Commission, in accordance with the State Ethics Code, has the authority to issue an informal advisory opinion after filing a Charge.

While the State Ethics Commission believed that the legislator's news releases were prepared solely for a campaign purpose, and that the legislator's actions violated HRS sections 84-13 and 84-13(3), the Commission believed that the legislator's actions were not sufficiently egregious to warrant a formal hearing, or the necessary use of taxpayer dollars and state resources by the Commission for a formal hearing. For these reasons, the Commission decided to issue an informal advisory opinion to the legislator, in lieu of continuing with formal charge proceedings.

Dated: Honolulu, Hawaii, July 9, 2003.

HAWAII STATE ETHICS COMMISSION

Ronald R. Yoshida, Chairperson
Dawn Suyenaga, Vice Chairperson
Nadine Y. Ando, Commissioner
Carl Morton, M.D., Commissioner

Note: Commissioner Eloise Lee participated in the Commission's decision in this case, but was not able to be present when this informal advisory opinion was signed.